Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-1341

MICHAEL RAY RICHTER,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
James M. Parkins

DONALD C. BROCKETT
Counsel for Respondent

West 1100 Mallon
Spokane County-City
Public Safety Building
Spokane, Washington
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The Respondent accepts the statements of the petitioner as to the OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

QUESTION PRESENTED

Whether the State Appellate Court, applying the "totality of the circumstances" test of Schneckloth v. Bustamonte, properly determined petitioner's consent to search to have been voluntarily given.

STATEMENT OF THE CASE

The respondent accepts petitioner's statement of events leading to the actual arrest of petitioner. During the arrest of the petitioner, Deputy O'Dell did pull his gun and place it in close proximity to the right side of the petitioner's head prior to handcuffing him. The petitioner was then given Miranda warnings orally and in writing by Deputy Massong. The written Miranda warning was in the form of a printed card, and it was during this time that the deputies advised the petitioner that they were deputy sheriffs for Spokane County. The petitioner was advised that his arrest was based on his unlawful possession of marijuana observed in the living room of the home and the quantity of marijuana that the petitioner had retrieved from another room of the home to show the deputies.

Deputy Massong then advised the petitioner that because he had shown them marijuana from another room, they believed the home contained other illegal drugs, and that they would attempt to obtain a search warrant for the home that very evening. The deputies further explained that the petitioner could agree to permit the deputies

to search the home for other drugs and in that event there would be no need for them to obtain a search warrant. In this regard, Deputy Massong handed the petitioner another printed card, referred to by the Sheriff's Office as a consent to search form (A. 1). This card carried the advice that the law enforcement officers were required to obtain a search warrant in order to search his home unless the individual consented to such a search. The petitioner filled in his name and residence address on the blank lines indicating he desired to consent to the search. The bottom of the card contained spaces for the witnessing officer's signature, the consenting individual's signature and the date and time of the signing. Massong's testimony was that he read the card's advice to the petitioner who indicated that it was apparent that there were drugs in the house and there was no need to obtain a search warrant because he already had knowledge that the deputies were going to obtain a search warrant. Massong then advised petitioner that any contraband found would be used against him. Deputy Massong stated that the petitioner read the card, examined it and signed it. The card was signed at 9:50 p.m and the testimony in the case reflected that the deputies had been invited into the petitioner's residence at 9:00 p.m.

Following the arrival of additional officers summoned for assistance, the other occupants of the home were arrested and advised of their rights. The deputies then conducted a search of the residence with the petitioner accompanying them and showing them various portions of the house where things were located.

The petitioner waived jury trial and was convicted in Spokane County Superior Court following the court's denial of petitioner's motion to suppress the evidence. The trial court made the findings in open court on the record of proceedings that the petitioner's consent was voluntarily given and orally presented its summation of the testimony.

ARGUMENT

I. THE STATE APPELLATE COURT, APPLYING THE "TOTALITY OF THE CIRCUMSTANCES" TEST OF SCHNECKLOTH V. BUSTAMONTE, PROPERLY DETERMINED PETITIONER'S CONSENT TO SEARCH TO HAVE BEEN VOLUNTARILY GIVEN.

The State appellate courts of Washington require careful independent examination of the testimony, the findings, and the record when fundamental constitutional rights are in issue in accordance with the case of Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). In Re McNear v. Ray, 65 Wn.2d 530, 398 P.2d 732 (1965); State v. Rye, 2 Wn.App. 920, 471 P.2d 96 (1973).

This is clearly recognized in the Appellate Court opinion wherein it is stated:

> The voluntariness of a consent is a question of fact to be determined from the totality of circumstances of each case.[1] Because the validity of the

[1] Schneckloth v. Bustamonte, 412 U.S. 218,224, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973); State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

search presents a constitutional issue, we will make an independent review of the entire record in deciding the voluntariness of the consent.[2] However, when evidence is conflicting, as in the present case, the trial court's finding of voluntary consent will be accorded great weight by this Court.[3] The burden remains on the State to affirmatively prove consent.[4] (Pet.'s A. ii)

The Appellate Court also stated:

> Upon careful review of the record, we find evidence which if believed shows Mr. Richter's consent to be involuntary. At the time of the consent, Mr. Richter was a minor, under arrest, and handcuffed. A demand for consent was made by deputies when Mr. Richter's mind was confused from the effects of liquor, dope, and the shock of arrest. He was told of, but was not allowed to read, his right to refuse the search. He had been told to run so deputies could "put a bullet through him" or "blow him away," and had a gun held to his right temple while the premises were being secured. A gun was still drawn when the consent form was signed, there being other occupants of the house to guard. Mr. Richter feared for his own safety, believing the armed deputies to be intoxicated with

[2] State v. Garske, 74 Wn.2d 901, 902-03, 447 P.2d 167 (1968); State v. Smith, 72 Wn.2d 479, 481, 434 P.2d 5 (1967).

[3] State v. Smith, 72 Wn.2d 479, 481, 343 P.2d 5 (1967).

[4] Bumper v. North Carolina, 391 U.S. 543, 548, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968); State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975).

liquor and dope. Finally, he was told by deputies that it would be necessary to wake, and thus anger, a magistrate to secure a search warrant if consent was not given.

Contrary testimony shows Mr. Richter's consent to be voluntary. He was a high school graduate. He was given Miranda warnings orally and in writing, was advised orally and in writing of his right to refuse the search, and then signed the consent form.[5] Mr. Richter stated at the time of signing that he was acquiescing in the search because he believed deputies had sufficient cause to get a search warrant if consent was refused.[6] He was coherent, competent, and not intoxicated when he consented--demonstrated by his concern with deputies awakening and angering a magistrate to get a search warrant, which he feared would prejudice the future of his case. Finally, and most importantly, the Court listened to the testimony of Mr. Richter, observed his demeanor, and disbelieved his testimony of coercion. (Pet.'s A. ii, iii)

The trial court fully complied with the dictates of this court in Schneckloth, supra, and of the 9th Circuit Court of Appeals in United States v. Rothman, 492 F.2d 1260 (Cir. 9, 1973) in that the trial court made explicit findings, on the record, on the issue of whether voluntary consent had been given.

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[5]See State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975); State v. Smith, 72 Wn.2d 479, 481, 434 P.2d 5 (1967).

[6]See State v. Lyons, 76 Wn.2d 343, 346-47, 458 P.2d 30 (1969).

The State Appellate Court concluded, on review of the record and the totality of circumstances, that there was sufficient evidence even though conflicting to support the finding of voluntary consent and that the petitioner made a free and unconstrained choice to allow a search of his home.

Therefore, the State Appellate Court properly determined the question of consent in accordance with applicable decisions of this court.

II. GRANTING THE WRIT OF CERTIORARI WOULD CONSTITUTE A REVIEW OF THE EVIDENCE OR INFERENCES DRAWN FROM THE EVIDENCE.

In General Talking Pictures Corporation v. Western Electric, 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1938), this court stated that it will not grant a writ of certiorari merely to review the evidence or inferences drawn from it. Id. 82 L.Ed. 1275.

Respondent submits that the opinion of the State Appellate Court sufficiently demonstrates that that court applied the totality of the circumstances test of Schneckloth, supra, in finding that consent had been voluntarily given. It is further submitted that while the State court judgment may have decided a federal question of "substance" the judgment was based upon the Schneckloth, supra, test and a review of the judgment on writ of certiorari would benefit only the petitioner and not the public at large. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

Hence, it would be inappropriate to grant the writ of certiorari.

CONCLUSION

The decision of the Washington State Court of Appeals was determined in accord ance with the voluntariness test of Schneckloth, supra, and the applicable decisions of this court and hence the petition should be denied. It is clear in this case that the trial court made findings on the record, which findings were reviewed on appeal and upheld as demonstrated in the Court of Appeals' opinion where it said:

> The trial court weighed conflicting evidence and found the consent voluntary, which finding is entitled to great weight on review. After reviewing the record we conclude there is sufficient evidence to support the finding of voluntary consent. The totality of circumstances shows that Mr. Richter made a free and unconstrained choice to allow a search of his home. The search was inoffensive to principles of due process, with fruits of the search being properly admissible.[7] (Pet.'s A. iii)

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[7]Schneckloth v. Bustamonte, 412 U.S. 218, 225, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973); Culombe v. Connecticut, 367 U.S. 568, 602, 6 L.Ed. 1037, 81 S.Ct. 1860 (1961).

Moreover, the petitioner would have this court review the evidence and inferences to be drawn therefrom for the benefit of only the petitioner.

Therefore, the respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

Donald C. Brockett

Of Counsel:
James M. Parkins

DONALD C. BROCKETT
Counsel for Respondent

West 1100 Mallon
Spokane County-City
Public Safety Building
Spokane, Washington
99201

DATED April 20, 1977

APPENDIX A

SEARCH CONSENT WAIVER FORM

SPOKANE CO. No. 23301

STATE VS. RICHTER

PLTFS. EXHIBIT No. 1 ADMITTED

SEARCH CONSENT WAIVER FORM 7509647

Place 3017 N. Cora Date 9-17-75 Time 2150

You are being asked to allow an officer(s) of the Spokane County Sheriff's Department permission to search your (vehicle - premises - person - other _____.) You have the right to refuse permission to make such search, and require that the officer(s) obtain a search warrant. You may waive this requirement and consent to the search and possible seizure.

I, Mike Richter (have read), (had read to me) this statement of my rights and I understand what my rights are. I am willing to allow the officer(s) permission to search my _____ N 3017 Ferrall. I am doing this voluntarily without promise or coercion. I understand what I am doing.

Witnessed Danny or Odell 208 Signed /s/ Mike Richter

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